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In the Supreme Court of the United States

OCTOBER TERM, 1973

ALEXANDER J. ANTOINE AND IRENE F. ANTOINE,
HIS WIFE, APPELLANTS

v.

THE STATE OF WASHINGTON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's order of February 19, 1974, inviting the Solicitor General to express the views of the United States in this case.

1. Alexander Antoine and his wife, Irene, were convicted in the courts of the State of Washington for shooting and killing a deer out of the state hunting season. Their defense was that they killed the deer on land within the boundaries of the original Colville Indian Reservation on which they have the right to hunt subject only to tribal or federal regulation.[1] Mr.

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[1] The status of the southern half of this reservation was the subject of *Seymour* v. *Superintendent*, 368 U.S. 351. This case, as explained within, concerns residual rights in the northern half.

Antoine is an enrolled member of the Colville Confederated Tribes, which are recognized by the United States government. Mrs. Antoine is a Canadian Indian and is not enrolled in the United States.[2]

By Executive Order of July 2, 1872 (1 Kapp. 915) President Grant established a reservation for Indian tribes which subsequently formed the Colville Confederated Tribes. Pursuant to an Act of August 19, 1890, 26 Stat. 355, a commission was appointed by the President to negotiate with the Tribes for "the cession of such portion of said reservation as said Indians may be willing to dispose of * * *." The commission entered into an agreement with the Tribes dated May 9, 1891 (J.S. App. F) in which the Tribes surrendered to the United States (Article I) " * * * all their right, titles, claim and interest in * * *" (J.S. App. F, F1) a tract of land constituting approximately the northern half of the reservation. Article 6 of the agreement stated that " * * * the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (*id.* at F4). Article 12 provided that the agreement "shall go into effect from and after its approval by Congress" (*id.* at F7). The other articles in the agreement gave the Indians various rights, including a right to allotments on the ceded land, and a cash payment of $1,500,000, in five installments.

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[2]The State does not contest that both Mr. and Mrs. Antoine are entitled to the rights of members of the Colville Tribes on the property in question, but argues that such rights do not encompass hunting free of state regulation. See J.S. App. A, A1, A3-A4.

Congress, in 1892 (Act of July 1, 1892, 27 Stat. 62), did not approve the agreement but enacted many of its provisions. In particular, the northern half of the reservation was "vacated and restored to the public domain, notwithstanding any executive order or other proceeding whereby the same was set apart as a reservation for any Indians or bands of Indians," and was "open[ed] to settlement * * * [to be] disposed of under the general laws applicable to the disposition of public lands in the State of Washington" (*id.* at 63). Article 6 of the 1891 agreement, securing the right to hunt and fish, and Article 11, providing a consideration of $1,500,000 for the land sold, were omitted from the Act (J.S. App. F).

By Act of June 21, 1906, 34 Stat. 325, 377-378, Congress authorized the payment of $1,500,000 for the land ceded to the United States under the 1891 agreement and the 1892 Act. The 1906 Act stated, *inter alia*, that payment of the money was "[t]o carry into effect the agreement [dated May 9, 1891] entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States * * *." The $1,500,000 authorized in the 1906 Act was actually appropriated for the Indians in five subsequent Acts, each providing $300,000: 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1074. Each of these statutes is essentially identical and provides that the appropriation is:

> In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by an

> Act of Congress "To provide for the opening of a part of the Colville Reservation in the State of Washington, and for other purposes," approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, *ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one,* • • •. [34 Stat. 1015, 1050-1051; emphasis added.]

In affirming appellants' conviction, the Supreme Court of the State of Washington held that the 1891 agreement was a mere contract between the Indians and the United States, which does not bind the State of Washington (J.S. App. A, A13). The court also held that the agreement, even if enforceable against the State, was not intended to exempt the Indians from state game laws *(ibid.)*.

We disagree with the decision of the Supreme Court of the State of Washington on both questions.

2. The agreement of May 9, 1891, was not self executing, but by its terms was to become effective "• • • from and after its approval by Congress" (J.S. App. F, F7). There is thus no question in this case of enforcing a bare agreement against a non-party. The question is whether the agreement was approved or ratified by Congress and thus became a law binding on the States. U.S. Const., Art. VI, cl. 2; see *Perrin* v. *United States*, 232 U.S. 478.[3]

[3]Washington, in assuming limited jurisdiction over Indians under Public Law 83-280, 67 Stat. 588, enacted RCW 37.12.060 which states:

> Nothing in this chapter • • • shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, *agreement*, statute, or executive order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof. [Emphasis supplied.]

Following the signing of the 1891 agreement, the House of Representatives voted to ratify the agreement, with certain changes. In particular, the House bill replaced the $1,500,000 lump sum payment called for in the agreement with a payment of $1.25 per acre, to be paid to the credit of the Indians as the land would be opened for homesteading. The bill explicitly preserved the hunting and fishing rights guaranteed in the agreement. 23 Cong. Rec. 3840.

The Senate contested the Indians' title to a reservation created by executive order and expressed unwillingness to pay for what was being taken. See S. Rep. No. 664, 52d Cong., 1st Sess., p. 2. The Senate bill, which eventually became the Act of July 1, 1892, provided that the money from the sale of the land be at the disposition of Congress and made no mention of the hunting and fishing rights preserved in the agreement.

Fourteen years later, Congress, in the Act of June 21, 1906, 34 Stat. 325, 377-378, authorized payment of $1,500,000 expressly "[t]o carry into effect the agreement bearing the date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States • • •." One reason for this changed position was that Congress wanted to open up the southern half of the original reservation for non-Indian settlement but the Tribes refused to consent until the agreement for the

northern half was kept. Another reason, however, was that the Congress of 1906 was keenly aware of the government's breach of faith with the Indians in failing to honor the 1891 agreement and wished to correct the situation. Accordingly, the Act of June 21, 1906, was enacted. See S. Rep. No. 2561, 59th Cong., 1st Sess., pp. 134-135. Later in the same session, in appropriating $300,000 of the authorized funds, Congress expressly referred to the 1906 Authorization Act as an Act "ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one" *(supra,* p. 4). The authorization Act of 1906 and the subsequent appropriations Acts, in our view, constitute congressional ratification of the 1891 agreement.[4]

3. If the Court agrees with our view that Congress ratified the 1891 agreement, the question becomes whether that agreement affords appellants the right they claim. Article 6 of the agreement states "that the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged" (J.S. App. F, F4).

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[4]In *Confederated Tribes of the Colville Reservation* v. *United States*, Docket No. 181-C pending before the Indian Claims Commission, the United States, relying upon the language of the Act of June 21, 1906, but not the subsequent appropriations Acts, argued that the 1906 Act did not constitute a ratification of the 1891 agreement. Considering the Acts together, we now conclude to the contrary (and are so informing the Commission, while preserving our right to rely in that case upon the possibility that this Court in the present case may disagree with us). See *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275, 293; *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116, in which less specific language was considered ratification of Presidential acts. See also *Perrin* v. *United States*, 232 U.S. 478, 480; *Squire* v. *Capoeman*, 351 U.S. 1-7.

In *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 *(Puyallup I)*, this Court construed a clause in the Treaty of Medicine Creek (10 Stat. 1132-1133) which stated:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * *.

The Court, quoting from *United States* v. *Winans*, 198 U.S. 371, stated (391 U.S. at 397):

> To construe the treaty as giving the Indians "no rights but such as they would have without the treaty" * * * would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

As a result, the Court held that (391 U.S. at 398):

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State * * *. But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State *in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.* [Emphasis added.]

"Appropriate standards" refers to a showing that the regulation is a reasonable and necessary conservation measure. See *Tulee* v. *Washington*, 315 U.S. 681, 684; *Department of Game* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44. As this Court noted in *Puyallup I*, *supra*, 391 U.S. at 402, n. 14, the

standard to be applied is more stringent than the usual federal constitutional standard concerning the scope of the police power of a state. The special rights of the Indians must be accommodated, so long as consistent with preservation of the game in question. See also *Menominee Tribe* v. *United States*, 391 U.S. 404.

The State of Washington has not shown that the prevention of out of season hunting of deer on the land in question by beneficiaries of the rights of the Colville Tribes is in any way necessary or even useful for the conservation of deer—and the interests of conservation often are served by the thinning of a herd. Nor has the State shown whether, if some regulation is desirable, the taking of deer by Indians for private consumption need be prohibited. We therefore agree with appellants that their criminal conviction was invalid.

CONCLUSION

The case presents a substantial federal question; probable jurisdiction should be noted or, in the alternative, the judgment should be reversed.

Respectfully submitted.

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